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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1263

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Petitioner,

—against—

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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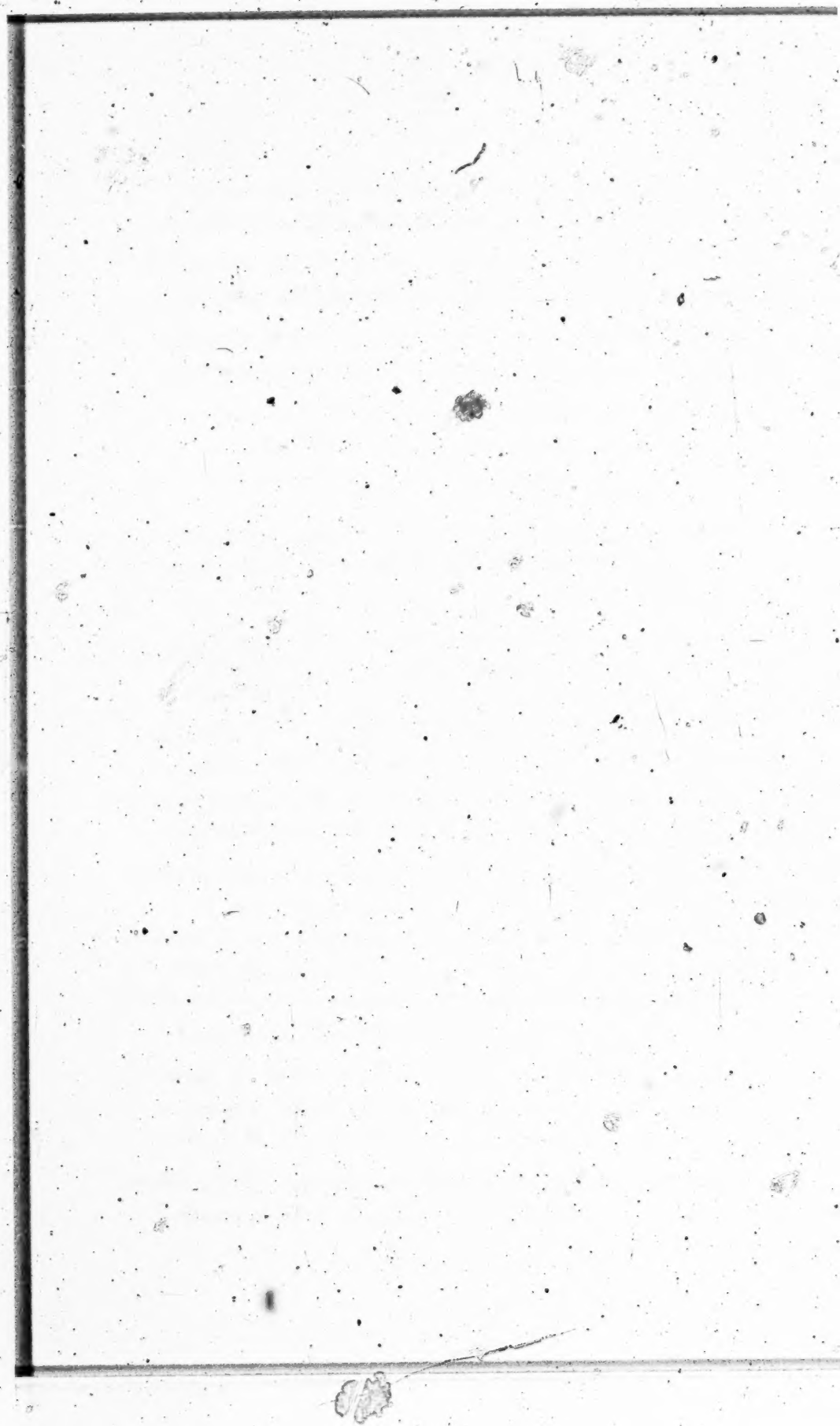
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on January 13, 1967.

Opinions Below

The opinion issued by the Court of Appeals for the Seventh Circuit, not yet reported, is printed in Appendix A hereto. The unreported judgment of the Court of Appeals is printed in Appendix B hereto.

The opinions of the Respondent Federal Power Commission and its original order herein are reported at 34 F.P.C. 1513 and printed at pp. 471-509 (R. 11154-11181) of the Joint Appendix (Volume II) submitted to the Court below, nine copies of which are filed herewith pursuant to Rule 21, Paragraph 4 of this Court. The Federal Power Commission Opinion and Order Denying Rehearing, not yet reported, are printed at pp. 525-531 (R. 11201-11205) of the Joint Appendix (Volume II). The unreported decision of the Presiding Examiner is printed at pp. 456-470 (R. 10969-10979) of the Joint Appendix (Volume II).

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was dated January 13, 1967, and was entered on January 13, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. §825*l*(b).

Questions Presented

1. Whether the Federal Power Act confers upon the Federal Power Commission jurisdiction to regulate wholesales by a public utility operating wholly within a single state of electric energy sold for redistribution wholly within such state, a portion of which energy may have originated outside such state, where such wholesales are presently being regulated by the authorities of such state, and where the entire amount of such energy as may have originated outside such state has already been rate-regulated by the Federal Power Commission?

2. Whether, in determining that certain wholesale sales of electric energy are "in interstate commerce" and subject to its jurisdiction, the Federal Power Commission is permitted to conclude that wholesale sales, made by a public utility located and independently operated solely in one state and having no corporate affiliations with any interconnected company, are subject to federal regulation on the grounds that the utility is located in "a large power pool", without any showing that energy transmitted from another state is delivered and consumed as a result of these sales (Federal Power Act §201(c))?

Statutes Involved

The following relevant statutes and their official citations are printed in Appendix C hereto:

Sections 201, 205, 206 and 313(b) of the Federal Power Act; 16 U.S.C. §§ 824, 824d, 824e, and 825*l*(b).

Statement

Petitioner Public Service Company of Indiana, Inc. is an electric utility corporation operating solely within the State of Indiana. It is not affiliated with any other electric utility or holding company.

On May 1, 1964, the Respondent Federal Power Commission (FPC or Commission) issued an order pursuant to Sections 201, 205 and 206 of the Federal Power Act (Act) initiating a investigation and hearing to determine whether sales by Petitioner to 46 municipal electric systems (municipals) and 31 rural electric membership

corporations (REMC's), all of which are located solely within the State of Indiana, were subject to the regulatory jurisdiction of the Commission. Petitioner is concededly a "public utility" as defined in §201(e) of the Act; the dispute is confined to the narrow issue of the Commission's authority to regulate sales to these customers.

The sales in question have been regulated for many years by the Public Service Commission of the State of Indiana (Indiana Commission). That Commission has regulated Petitioner's sales to its municipal customers since 1915, and its sales to its REMC customers since 1937 (R. 877-879). Regulation by the Indiana Commission has been thorough and active; it has frequently required changes to be made in rates charged these customers (R. 879-889).

Petitioner is interconnected with six neighboring public utilities, either within the State of Indiana or at the state line.* These interconnections represent the only points through which energy transmitted from a state other than Indiana can reach Petitioner's system (R. 890, 1846-1849). Sales transactions with these neighboring utility systems are not in issue in this proceeding. Rate schedules covering such service at each and every such point of interconnection have been filed with and are kept on file with the Commission and are subject to the plenary and exclusive regulatory authority of the Commission. Thus the Commission presently rate-regulates all interstate energy received by Petitioner through the several points of interconnection around the rim of its system.

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* The facts are stated herein as of the time the hearings closed on December 15, 1964. Since that time Petitioner has effected an interconnection with a seventh neighboring public utility.

Petitioner plans its system so that it can be and is operated without relying on the facilities of any other electric utility system (R. 284-287, 616). Petitioner's agreements with the utilities with which it is interconnected contain no presently effective provisions for any multi-state "pool-type" operation. None of them provides for any central discipline, assignment of generation or other regulation. Daily operations on Petitioner's system are conducted without regard to the facilities of or the loads on the system of any other electric utility, although Petitioner does effect operating economies through purchase and sales transactions over its interconnections with neighboring utilities (R. 717-718).

After hearings before a presiding examiner and exceptions to the examiner's decision, the Commission held by a 4-1 majority that the sales in question were subject to Commission jurisdiction (R. 11154-11181). The decision of the Commission was upheld by the United States Court of Appeals for the Seventh Circuit on January 13, 1967.

Reasons for Granting the Writ

1. The Commission does not have jurisdiction over the sales in question because Congress, in enacting Part II of the Federal Power Act, preserved state regulation to the fullest extent and reserved jurisdiction over these sales to the State of Indiana.

The Court of Appeals evidently believed that this Court's decision in *Federal Power Comm'n* v. *Southern Calif. Edison Co.*,* foreclosed it from any consideration of Petitioner's contention that jurisdiction over these sales

* 376 U.S. 205 (1964). The case may be referred to herein as *Southern California Edison* or the *Colton* case.

has been reserved to the State of Indiana (slip op. page 6). In any event, the Court of Appeals did not discuss the point.

This conclusion is in error. The critical difference between the cases is that in the present case all sources of interstate energy are subject to prior FPC regulation *before* any state regulation attaches. In view of this federal rim-regulation of all out-of-state inputs into Petitioner's system, which lies wholly within the State of Indiana, there is no necessity to extend federal regulation to the ensuing wholesale sales within the State of Indiana. The Commission has already fixed the price of energy at the rim of the intrastate system and the energy has lost all interstate aspects. In the words of the dissenting Commissioner below:

> "In this proceeding all facilities of PSCI are located within one State, and thereby the costs of PSCI, except for the transfers [of] out-of-state energy, are within the effective authority of the Indiana Public Service Commission. The regulatory scheme dovetails, and the issue of whether we should presume interstate power reaches each sale for resale should not be resolved against the state commission." (R. 11176)

Nevertheless, to the extent that the Court of Appeals may have been in fact restricted by this Court's decision in *Southern California Edison,* Petitioner respectfully requests that this Court reconsider its decision therein, to make clear that the Congressional intent in enacting Part II of the Federal Power Act was to provide a comprehensive federal regulatory scheme over only those sales which Congress at that time considered were *beyond the scope of state jurisdiction.* Clearly the energy delivered to the sales in question has lost all of its interstate aspects, and

regulation of these transactions was not within the contemplation of Congress when it extended Commission jurisdiction in 1935.

Indeed, the then-existing Commission was itself the principal draftsman of Part II of the Federal Power Act. During Congressional hearings prior to the bill's enactment spokesmen for the Commission continually assured Congress that the intention of the bill was to provide for federal regulation in only those instances when national control was necessary, but that the Commission did not intend to intrude upon comprehensive and constitutional state regulation.*

This continually repeated and emphasized intent to permit state regulation to the fullest possible extent consistent with effective national control has been repeated often in decisions interpreting Part II of the Federal Power Act.**

This Court's reasoning in *Connecticut Light & Power Co.* v. *Federal Power Comm'n*, 324 U.S. 515 (1945), confirms this interpretation. In that case interstate energy delivered to and sold by the Connecticut company had already been regulated by the Commission. Therefore

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* See, *e.g.*, statements of Dozier DeVane, then the Commission's Solicitor, in hearings on H.R. 5423 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., at 495 (1935); hearings on S. 1725 before the Senate Interstate Commerce Committee, 74th Cong., 1st Sess., at 247, 249 (1935). See also H. Rep. No. 1318, 74th Cong., 1st Sess., 827 (1935); Sen. Rep. No. 621, 74th Cong., 1st Sess., 48 (1935).

The legislative history cited in *Southern Calif. Edison*, 376 U.S. at 213 n. 8, is not in conflict. Although the "general consensus" does reflect an understanding that *Public Util. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927), denied the states power over transactions wherein energy was sold at wholesale between states, it indicates no belief that the states lacked power to regulate rates, either at wholesale or at retail, once federal regulation over all interstate aspects of the transactions had been completed.

** See *Connecticut Light & Power Co.* v. *Federal Power Comm'n*, 324 U.S. 515, 531 (1945). See also *Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19 (1961), for a parallel decision under the Natural Gas Act.

further federal jurisdiction over the Connecticut company or its wholesale rates was unnecessary and inconsistent with the legislative intent of §201 of the Act.

> "Here, * * * the federal authority to fix the sale price of the energy coming from Massachusetts in interstate commerce attaches and presumably has been or at least may be exercised pursuant to the Jersey Central holding before the energy reaches this Company. What petitioner does or fails to do is only after the incidence of federal regulation and can in no way frustrate it." 324 U.S. at 524.

State jurisdiction over the Connecticut company and its wholesale and retail sales was permissible, because it could not interfere with effective federal regulation over the national aspects of the interstate energy sold by the Connecticut company.

This Court's decision in *Southern California Edison* is consistent with both the *Connecticut* case and the position here advocated by Petitioner. *Southern California Edison* concerned a sale for resale to a municipality by a distributing company which bought energy at its generation point, carried it across state lines by means of its own transmission system into the state of ultimate consumption and then sold this energy at wholesale. The price of the energy was established by the Secretary of the Interior at the point of generation. There was, however, no sale to which FPC rate jurisdiction could attach until the sale to the municipality was made in the state of ultimate consumption.

Under these circumstances, the state regulatory agency could not effectively regulate the cost of the out-of-state energy. The state agency could not have had the assurance, as it would have had if this energy had already been

cost-controlled by the FPC when it entered the state, that the price of the energy to the distributing vendor was fair and reasonable. Effective state regulation is impossible unless energy entering the state has been rate-regulated by the FPC. *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

In Petitioner's situation, the Indiana Commission comprehensively regulates all sales of energy within the State of Indiana. Such regulation must and does recognize as an element of the cost of service the price fixed under FPC regulation and paid by Petitioner for any energy received through its interconnections with its neighboring utility companies. The cost of such energy as regulated by the FPC is controlling in the computation of the total cost of service considered by the Indiana Commission in fixing rates (R. 890-891). Thus the Indiana Commission in fixing intrastate rates can exert jurisdiction over all such energy as if it had been generated within the State of Indiana. There is no necessity to extend FPC jurisdiction to the ensuing wholesale sales to REMC's and municipals within the State of Indiana; federal regulation has already fixed the price of any out-of-state energy that may be included, and such out-of-state energy has lost all of its interstate aspects insofar as rate regulation is concerned.

Federal jurisdiction over Petitioner's sales to its municipal and REMC customers is, therefore, as unnecessary as was federal jurisdiction over the utility in the *Connecticut* case. This Court has never allowed federal jurisdiction to supplant state regulation under these circumstances.

2. The Commission's assumption of jurisdiction over the sales in question without any substantial evidence of record that any energy delivered through these sales was generated outside of the State of Indiana is in conflict with the requirements of the Federal Power Act and the mandates of this Court.

The Court of Appeals, in upholding the Commission's assumption of jurisdiction, described the basis for it as follows:

> "The ultimate finding of the Commission upon which it asserted jurisdiction is substantially that PSCI's interconnections with other public utilities locates it in a 'large power pool' from which PSCI receives 'large quantities' of out-of-state energy resulting in 'pool sales' subject to Commission regulation." (slip op. p. 2)

Section 201(c) of the Federal Power Act (49 Stat. 847; 16 U.S.C. 824(c) (1964)) defines electric energy ". . . as transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof . . ."

Proof that electric energy generated in a state other than Indiana was delivered to each of Petitioner's municipal and REMC customers is thus an essential element of an assertion of jurisdiction over these sales. The type of proof required to establish the transmission of electric energy in interstate commerce has been set forth clearly by this Court. The evidence must be "engineering and scientific rather than . . . legalistic or governmental . . ." (*Connecticut Light & Power Co.* v. *Federal Power Comm'n*, 324 U.S. 515, 529 (1945); quoted with approval in *Federal Power Comm'n* v. *Southern Calif. Edison Co.*, 376 U.S. 205, 209 n. 5 (1964)). See also *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965).

The Commission did not attempt to meet the "engineering and scientific" test, resting its determination instead on the purely conceptual ground that Petitioner is a member of "an interstate power pool" and that Petitioner's sales are ". . . as a consequence, sales made from an interstate pool." (R. 11158) The court below not only accepted the Commission's conceptual approach but expanded upon it. The court stated that Petitioner "...is interconnected in the same interstate network to which I&M and Arkansas Light & Power are connected. Within that network, there are several more highly integrated 'power pools,' one of which includes PSCI."* No attempt was made either by the Commission or by the Court of Appeals to define the extent of these "power pools."

The Court of Appeals has thus ignored the fundamental differences between Petitioner's system and those of large, multi-state holding companies. Whether or not the characteristics of the latter type of system require the Commission to abandon methods of proof previously employed by the Commission and approved by this Court, such departures are clearly not required by the facts in this proceeding. Petitioner believes that the Commission's adoption of such arbitrary procedures merits review by this Court.

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* The Court's mention of "I&M" and "Arkansas Light & Power" referred to previous Commission findings of jurisdiction over sales which were upheld by the courts. (*Indiana & Michigan Electric Co.* v. *Federal Power Comm'n*, 365 F.2d 180 (7th Cir. 1966); *cert. denied*, 385 U.S. 972 (1966); and *Arkansas Light & Power Co.* v. *Federal Power Comm'n*, 368 F.2d 376 (8th Cir. 1966). However, both of these cases involved sales from a multi-state holding company system in which energy was generated and sold throughout the system on an economy basis without regard to state lines.

Conclusion

For the reasons set forth herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

Of Counsel:

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Appendix A

In the

United States Court of Appeals

For the Seventh Circuit

No. 15654 SEPTEMBER TERM, 1966 SEPTEMBER SESSION, 1966

PUBLIC SERVICE COMPANY OF INDIANA, INC., *Petitioner*, v. FEDERAL POWER COMMISSION, *Respondent*. } Petition To Review a Final Order of the Federal Power Commission.

January 13, 1967

Before KILEY, FAIRCHILD and CUMMINGS, *Circuit Judges*.

KILEY, *Circuit Judge*. The question raised by this petition to review is whether the Federal Power Commission has power to regulate the rates charged by the Public Service Company of Indiana (PSCI) in sales to its municipal and cooperative customers. The Commission order asserted jurisdiction under section 201(b) of the Federal Power Act.[1] We deny the petition and affirm the order.

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1 49 Stat. 847-48 (1935), 16 U.S.C. § 824(b) (1964).

Appendix A

PSCI, a public utility and Indiana corporation with its principal office in Plainfield, Indiana, operates entirely within Indiana, doing business in 69 of the 92 counties but serving only large rural areas and Indiana's smaller cities. It owns and operates five steam generating plants and has extensive power lines able to transmit large "blocks of power" to all parts of its system. It is interconnected with six other public utilities at points within Indiana or at the state line. Three of these utilities serve areas outside Indiana.[2] The sales in issue have been regulated by Indiana's Public Service Commission "for many years."

The order on appeal resulted from a proceeding initiated by a Commission order directing an investigation and public hearing to determine mainly whether PSCI's sales to Municipal Electric Systems (Municipals) and Rural Electric Membership Corporations (REMCs) were sales at wholesale in interstate commerce.[3] The Presiding Examiner found that PSCI sold out-of-state energy at wholesale to Municipals and REMCs from a power pool or coordinated multi-state electric network and recommended substantially the order which the Commission eventually entered upon adopting the Examiner's findings.

The Commission found that PSCI was interconnected with a single multi-state integrated electric power system and that PSCI's sales to its municipal and cooperative consumers were sales at wholesale in interstate com-

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2 Indiana and Michigan Electric Company serves both Indiana and Michigan, and its interconnection with PSCI is within Indiana. The other two utilities, interconnected at the state line, are Louisville Gas and Electric Company (Kentucky) and Cincinnati Gas and Electric Company (Ohio). After the hearings closed in December, 1964, PSCI interconnected with a seventh public utility, Central Illinois Public Service Company.

3 During 1963 21% of PSCI's distributed power was sold to Municipals and REMCs. Revenue from these sales in 1963 and in each of the several years prior to 1963 was approximately 11% of total revenue.

merce. This finding is vital to the Commission's jurisdiction and is the principal target of PSCI's contentions.

The ultimate finding of the Commission upon which it asserted jurisdiction is substantially that PSCI's interconnections with other public utilities locates it in a "large power pool" from which PSCI receives "large quantities" of out-of-state energy resulting in "pool sales" subject to Commission regulation.

PSCI contends that there is no substantial basis in the record for the conclusion that its sales were in interstate commerce because the Commission did not employ point-to-point tracing studies as in many previous cases. The Commission's test, it argues, was an arbitrary nonscientific "power pool" test, instead of the "engineering and scientific" test stated by the Supreme Court in *Connecticut Light & Power Co. v FPC*, 324 U.S. 515 (1945), and *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205 (1964) (the *Colton* case). In *Connecticut*, the Court said that federal jurisdiction followed an "engineering and scientific" test rather than a "legalistic or governmental" test, pointing out that "if any part of a supply of electric energy comes from outside of a state it is, or may be, present in every connected distribution facility." 324 U.S. at 529. In context, this statement emphasized the potential reach of federal jurisdiction and demonstrated the need for enforcing the local distribution facilities exception to reconcile the claims of federal and local government. The Court did not discuss the meaning of the "engineering and scientific" test.

In *Colton*, however, the Supreme Court applied the test in holding that there was substantial evidence to support FPC jurisdiction over the *sales* involved there (by a con-

ceded public utility). 376 U.S. at 209, n.5. Tracing had been used in that case and was relatively easy, since the sales involved were made to one customer. We are not persuaded that *Colton* and *Connecticut* are applicable to rule out use by the FPC of the so-called "power pool" test on the record before us. Scientific evidence can be circumstantial as well as direct.

The use of the "power pool" test was approved in both *Indiana & Mich. Elec. Co. v. FPC*, 365 F.2d 180 (7th Cir. 1966) (*I & M*), *cert. denied*, 35 U. S. L. WEEK 3200 (Dec. 6, 1966), and *Arkansas Light & Power Co. v. FPC*, No. 18262, 8th Cir., Nov. 7, 1966. In *I & M*, this court said: "We think the Commission was justified in holding that the important consideration in determining jurisdiction here is the integrated interstate pool character of the operation." 365 F.2d at 184. And in *Arkansas*, the court said it was not prepared to say that "detailed tracing studies are a *sine qua non*" to federal jurisdiction, where there is an interstate "pool assist" operation.

It is true, as the Commission found, that there are "obvious differences" between the case before us and *I & M* and *Arkansas*, in that they both "involved corporate control and centralized operation." But the distinctions which PSCI seeks to make between its operation and the operations in those two cases are not persuasive. They presuppose that PSCI is an "independent, non-affiliated electric utility which is not a member of a power pool." This presupposition flies in the face of the uncontrovertible fact that PSCI is interconnected in the same interstate network to which I & M and Arkansas Light & Power are connected. Within that network, there are several

more highly integrated "power pools," one of which includes PSCI. Its participation in this pool by virtue of its interconnections, even though only for economy and emergency purposes, results in the introduction of a substantial amount of out-of-state energy into PSCI's system.[4]

Under the Federal Power Act the findings of the Commission as to the facts, if supported by substantial evidence on the record as a whole, are conclusive. Federal Power Act § 313(b);[5] *FPC v. Southern Cal. Edison Co.*, 376 U.S. at 209, n.5. The proof in the record before us is sufficient to support an inference, to a reasonable scientific certainty, that interstate energy entered all of the sales in question and commingled with PSCI-generated energy. Thus, we hold that the Commission did not err in asserting jurisdiction over PSCI's sales to the Municipals and REMCs. *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 420 (1952); *Arkansas Power & Light Co. v. FPC, supra*; *Indiana & Mich. Elec. Co. v. FPC*, 365 F.2d at 184; *Wisconsin-Michigan Power Co. v. FPC*, 197 F.2d 472, 478 (7th Cir. 1952), *cert. denied*, 345 U.S. 934 (1953). There are three reasons for our conclusion: PSCI's interstate interconnections bring it into virtually the same multi-state system, with the same physical properties, that this court in *I & M* thought justified the Commission's finding that the resulting "pool sales" were

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4 The Commission rejected the contention that the net flow of energy into the system (0.1% of PSCI's total energy requirements) was controlling in determining the existence of out-of-state energy in the sales to the Municipals and REMCs. We think this was a permissible administrative interpretation of the Act, especially in view of the benefits accruing to PSCI under the pooling arrangement. *Cf. Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 420 (1952). These benefits include increased reliability, reduced costs and reduction of its "spinning reserve."

5 49 Stat. 860-61 (1935), as amended, 16 U.S.C. § 825*l* (1964).

in interstate commerce.[6] Second, there is a lack of practical availability of facilities for tracing interstate energy into each PSCI sale to Municipals and REMCs.[7] Finally there is confirmatory evidence by Commission expert Jessel illustrating the necessary commingling of energy transmitted into the state with PCSI-generated energy.[8]

We disagree with PSCI that the Commission's decision before us reversed the burden of proof which Congress has placed upon the Commission[9] to establish its jurisdiction by showing that the wholesale sales to the Municipals and REMCs contained out-of-state energy. *Indiana &*

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6 In the case before us the Commission found:

> PSCI argues that we are obliged to show by the tracing methods used in the past that out-of-state energy reaches the physical points of sale involved herein. While there was a difference of opinion between witnesses for PSCI and our staff as to whether it is possible to make such a tracing study, such polemics are now irrelevant in light of our decision in *Arkansas, supra.* As we observed in that case, it is an oversimplification to talk in terms of a flow of electricity from point to point in an integrated power network. Instead, generation from each source in the system contributes directly or indirectly, and to an ever varying extent, to the energy present in all parts of the system which are not isolated from out-of-state sources. This rationale is equally applicable here. There is nothing in this record which establishes that the points of sale at wholesale are isolated from out-of-state sources. On the contrary, the record here demonstrates that the nature of PSCI's system is such that out-of-state energy could, at one time or other, reach all of PSCI's customers during the periods it admittedly was brought into and permeated the backbone transmission system.

7 The Commission expert was witness Jessel, Chief of the Division of Electric Resources and Requirements of the FPC. He gave testimony that tracing was neither feasible nor practicable for studying the PSCI system. He testified that the tracing method, even with "enormous advances in techniques," would take one to two years, and if conditions changed during the study, restudy would be needed and result in "making it almost impossible" to conclude the study.

8 Jessel testified from exhibits in evidence how energy received at PSCI's Gallagher generating station is commingled with energy received from Kentucky and the commingled energy then transmitted to Gallagher's substations, lower substations and lines supplied from these substations. He did the same with respect to energy received from *I & M* and companies in Illinois and Ohio. He concluded that for the hour subject of the tracing, "out-of-state energy permeated the entire system, except possibly" through one substation.

9 60 Stat. 241 (1946), 5 U.S.C. § 1006(c) (1964).

Mich. Elec. Co. v. FPC, 365 F.2d at 184. We think that the Commission could find that the FPC Staff met its burden on the record before us.

We see no necessity of extensively discussing *Jersey Cent. Power & Light Co. v. FPC*, 319 U.S. 61 (1943), and *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945), in connection with PSCI's contention that jurisdiction over the Company's sales to Municipals and REMCs is reserved to Indiana. The contention has no merit. *FPC v. Southern Cal. Edison Co.*, 376 U.S. at 209-10.

PSCI argues that because its sales to Municipals and REMCs are effected only through facilities used in local distribution, the Commission has no jurisdiction. The determination of this question involves factual questions and these are original matters for the Commission. *FPC v. Southern Cal. Edison Co.*, 376 U.S. at 210, n.6. We have found ample evidence in the record to support the Commission finding on this point.

The remaining points argued by PSCI are without merit. The argument based upon Indiana's many years of exercising jurisdiction over company rates was rejected by this court in *I & M*: "[A] history of previously unchallenged" state regulations does not oust the Commission of jurisdiction. 365 F.2d at 183. In *Wisconsin-Michigan Power Co.*, this court rejected the argument that sales to municipalities were exempt. 197 F.2d at 479. And the sales to REMCs are not exempt, because regardless of the character of the cooperatives and members, they are

persons within the meaning of section 201(d) of the Federal Power Act.[10] *Arkansas Power & Light Co. v. FPC, supra.*

AFFIRMED.

A true Copy:

Teste:

KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit.

10 49 Stat. 848 (1935), 16 U.S.C. § 824(d) (1964).

Appendix B

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Friday, January 13, 1967

Before

HON. ROGER J. KILEY, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*
HON. WALTER J. CUMMINGS, JR., *Circuit Judge*

No. 15654

PUBLIC SERVICE COMPANY OF INDIANA, INC., *Petitioner,* vs. FEDERAL POWER COMMISSION, *Respondent.*	Petition for review of an order of the Federal Power Commission.

This cause came on to be heard on the petition for review of an order of the Federal Power Commission and the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the order entered in this cause by the Federal Power Commission on December 22, 1965, be, and the same is hereby AFFIRMED, in accordance with the opinion of this Court filed this day.

[CORRECTED]

Appendix C

Section 201 of the Federal Power Act, 16 U. S. C. §824, 49 Stat. 847

DECLARATION OF POLICY—APPLICATION OF PART—DEFINITIONS

Sec. 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

Section 205 of the Federal Power Act, 16 U. S. C. §824d, 49 Stat. 851

Rates and Charges—Schedules—Suspension of New Rates

Sec. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the

jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, services, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into

effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and

in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 206 of the Federal Power Act, 16 U. S. C. §824e, 49 Stat. 852

POWER OF COMMISSION TO FIX RATES AND CHARGES—DETERMINATION OF COST OF PRODUCTION OR TRANSMISSION

Sec. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the

request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

Section 313(b) of the Federal Power Act, 16 U. S. C. §825*l*(b), 49 Stat. 860 as Amended 62 Stat. 991, 63 Stat. 107, 72 Stat. 947

REHEARINGS: COURT REVIEW OF ORDERS

Sec. 313.

* * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code.

Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1263

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unreported. The opinion of the Federal Power Commission (J.A. 471-509) is reported at 34 F.P.C. 1513, and its order denying rehearing (J.A. 525-526) at 35 F.P.C. 232.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1967 (Pet. App. 9a). The petition for a writ of certiorari was filed on April 12, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, as amended, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether petitioner's sales of electric energy for resale are sales in interstate commerce and hence subject to the jurisdiction of the Federal Power Commission.

STATUTES INVOLVED

The statutes involved—Sections 201, 205, 206 and 313(b) of the Federal Power Act, 16 U.S.C. 824, 824d, 824e and 825*l*(b)—are printed in Appendix C to the petition for a writ of certiorari.

STATEMENT

Petitioner here seeks review of an order of the Federal Power Commission, upheld by the Court of Appeals for the Seventh Circuit, determining that the Commission has jurisdiction to regulate petitioner's wholesale sales of electric energy.

It is conceded that petitioner is a public utility within the meaning of Sections 201(b) and (e) of the Federal Power Act (Pet. App. 2a), since it owns or operates facilities for the transmission or sale at

wholesale of electric energy in interstate commerce (J.A. 165; Pet. 4). It is also conceded that its lines are interconnected with those of several companies which operate facilities in other States and from which petitioner purchases and receives out-of-State energy (J.A. 47, 110-111, 173-174; Pet. 4, 5; Pet. App. 2a, 5a). And it is part of an extensive interstate power network (J.A. 197-198, 452-453; Pet. App. 3a, 4a-5a). The only issue is whether its sales are in interstate commerce, a necessary predicate of Commission jurisdiction (see Section 201(b), 16 U.S.C. 824(b). On this the record shows that electric energy flows freely into, out of, and throughout the interconnected interstate network of which petitioner is a part (J.A. 92-94, 173-174). The amount of generation by each system is constantly changing (J.A. 105-108), for every increase in load (demand) in any system automatically results in an instantaneous inrush of energy from the other interconnected systems (J.A. 103-104). Thus, a load receiving energy from one source in the network at one moment may be receiving energy from another source the next moment (J.A. 109).[1] Beyond this, the record also establishes the actual commingling of out-of-State energy received by petitioner's system with other energy, both at the point of receipt and at certain buses (distribution points) from which

[1] For a somewhat fuller technical description, see p. 3, n. 3 of the Commission's Br. in Opp. in *Indiana & Michigan Elec. Co.* v. *Federal Power Commission*, No. 646, this Term, certiorari denied, 385 U.S. 972.

commingled energy flowed to *all* of petitioner's wholesale customers (J.A. 110-115, 123-124, 302-305).

The court of appeals held that proof of petitioner's participation in an interstate power network from which it received substantial amounts of out-of-State energy was, as the Commission had held, "sufficient to support an inference, to a reasonable scientific certainty, that interstate energy entered all of the sales in question and commingled with PSCI-generated energy" (Pet. App. 5a). It also sustained the Commission's finding that its jurisdictional conclusion based on the nature of the network's operations was corroborated by actual staff studies of the flow of out-of-State energy throughout petitioner's system (Pet. App. 6a; J.A. 472-474, 526).

ARGUMENT

1. Petitioner argues that its sales at wholesale are not in interstate commerce. The identical contention was rejected by the same court of appeals in *Indiana & Michigan Electric Co.* v. *Federal Power Commission*, 365 F. 2d 180, and certiorari was recently denied, 385 U.S. 972. The other circuits that have passed on the question are in accord with the Seventh Circuit. *Arkansas Power & Light Co.* v. *Federal Power Commission*, 368 F. 2d 376 (C.A. 8); *Cincinnati Gas & Electric Co.* v. *Federal Power Commission*, C.A. 6, No. 17228, decided April 28, 1967; App., *infra*, pp. 7-11. That all wholesales of electric energy by a member of an interstate power pool are subject to the Commission's jurisdiction is also the

teaching of *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, which held that, where a pool of energy generated in several States supplies the entire system load, "the operations of the unified system enterprise are completely interstate in character, notwithstanding the fact that system energy transactions at some particular times may involve energy never crossing the State boundary." 343 U.S. at 420; see, also, *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472 (C.A. 7), certiorari denied, 345 U.S. 934; *Wisconsin* v. *Federal Power Commission*, 201 F. 2d 183 (C.A.D.C.), certiorari denied, 345 U.S. 934.[2] Although no more is required, the Commission's jurisdictional finding is independently supported by the flow studies, introduced in evidence, which showed that out-of-State energy was in fact received by all of petitioner's wholesale customers.

2. Petitioner contends that federal regulation of its wholesale sales is unnecessary and therefore improper because all sales of out-of-State energy to it are regulated by the Federal Power Commission and

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[2] It makes no difference that the pool of which petitioner is a member was not under common ownership; that was also the case in the *Pennsylvania Water & Power* case (see 343 U.S. at 419-420). Petitioner admits that it "does effect operating economies through purchase and sales transactions over its interconnections with neighboring utilities" (Pet. 5), and, as the court below found, petitioner's "participation in this pool by virtue of its interconnections, even though only for economy and emergency purposes, results in the introduction of a substantial amount of out-of-state energy into PSCI's system." Pet. App. 5a.

all of its own sales (being to Indiana customers) are subject to regulation by the Indiana Public Service Commission. This Court recently rejected the identical argument. *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, holds that the Commission's jurisdiction under the Federal Power Act extends "to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States" (376 U.S. at 216) and that the Act contains no exemption for out-of-State energy sold for consumption within the receiving State (*id.*, n. 9).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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PETER H. SCHIFF,
Acting Solicitor,

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Federal Power Commission.

MAY 1967.

APPENDIX

No. 17228

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE CINCINNATI GAS & ELECTRIC COMPANY AND THE UNION LIGHT, HEAT AND POWER COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

On Petition for Review of an Order of the Federal Power Commission

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Decided April 28, 1967.

Before WEICK, Chief Judge, PECK, Circuit Judge, and CECIL, Senior Circuit Judge.

WEICK, Chief Judge. This proceeding is to review an order of Federal Power Commission, made under the authority of Section 201 of the Federal Power Act[1] requiring the petitioners, The Cincinnati Gas & Electric Company (CG&E) and its affiliate, The Union Light, Heat and Power Company, to file and

[1] 16 U.S.C. § 824.

maintain on file with the Commission rate schedules covering their wholesale sales.[2]

The petitioners resisted jurisdiction of the Commission to make the order, claiming that, within the meaning of the Act, their wholesale sales did not involve the delivery to their customers of electrical energy generated out of the state, and in any event the sales were made from local distribution facilities and were therefore exempt under Section 201(b) of the Act.

A hearing was held before the Presiding Examiner of the Commission and evidence, including expert testimony, was offered by both the Commission and the petitioners.

The hearing consumed about fifteen days and the case was submitted to the Presiding Examiner on the evidence, oral arguments and briefs. The Presiding Examiner gave careful consideration to the case and handed down his Initial Decision, in which he adopted findings of fact and conclusions of law. His decision appears in twenty-nine pages of the record.

The Presiding Examiner found as a fact:

> "(10) At times each of the wholesale customers named above in (4) and (5) receives out-of-state electric energy from the multi-state power network of which the Cincinnati system is a part, such energy having been commingled with the Cincinnati system energy.
>
> "(11) The integrated and coordinated Cincinnati interstate electric system and the

[2] Petitioners admitted that three of CG&E's wholesale customers received out of state energy, but contended that evidence does not support the holding that eight others received such energy.

> systems with which it is interconnected and operating in synchronism form an integrated and operating power pool, and the sales of electric energy by the Cincinnati system to its wholesale customers named above in (4) and (5) are pool sales and by reason of the interstate nature of the pool are sales in interstate commerce."

He also found that the facilities from which the energy is delivered to CG&E's wholesale customers, were at least in part constructed and used to sell and interchange energy with other companies and are not used solely in local distribution. He further held that interstate wholesale sales are not exempt from jurisdiction of the Commission.

The Commission adopted the Presiding Examiner's Initial Decision in all material respects and ordered the filing of the rates.

It was conceded by petitioners that they are public utilities within the meaning of the Act.

CG&E and its wholly owned subsidiaries are a part of a coordinated and interconnected electric system serving a highly industrialized area of 2600 square miles in nine counties in southwestern Ohio, five counties in northern Kentucky, and one county in eastern Indiana. CG&E owns and operates three electric generating stations which are interconnected by transmission lines through Ohio and Kentucky. The system is connected with eight other utility companies in Ohio, Indiana and Kentucky. These other companies in turn are connected with other utilities which constitute the American Electric Power System.

All of these companies are part of the Interconnected Systems Group consisting of one hundred forty utility systems, in thirty-two states. The System forms a pool of multi-state energy which supplies the load of CG&E in synchronism with the other connected utilities. CG&E thus utilizes out of state energy as well as energy generated by it, to fulfill its requirements. In turn, energy generated by CG&E flows through the system, out of the state, and is used by other utilities.[3]

Staff witness Miller testified that each of the wholesale customers in question received out of state energy commingled with Ohio energy. Staff witness Dr. Jessel testified that in an interconnected pool operation, interstate energy was delivered to each of CG&E's wholesale customers.

Petitioners' claim was that the evidence was not sufficient to identify out of state energy as being delivered to the wholesale customers; that all units of electricity are identical and it is impossible to identify one unit from another; that the burden was upon the Commission to show the actual source of the specific units delivered to the wholesale customers, and it was scientifically impossible to do so.

There can be no question but that interstate as well as intrastate generated electricity was commingled and was flowing through the CG&E system. This is enough to sustain the Commission's jurisdiction.

It would indeed be impossible to prove the source of electrical current supplied from a pool. It was not necessary for the Commission to do so.

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[3] In 1963 CG&E system received 11% of its total net generation from out of state, of which 9% was from Indiana sources.

As well stated by the Court in *Pennsylvania Water & Power Co.* v. *F.P.C.*, 193 F.2d 230, at 241 (D.C. Cir. 1951) *aff'd* 343 U.S. 414 (1952):

> "Each sale is in effect a pool sale drawn from the integrated system and hence interstate in nature."

See also *United States* v. *Public Util. Comm'n of Cal.*, 345 U.S. 295 (1953).

Other Appellate Courts have rejected similar contentions. *Indiana & Mich. Elec. Co.* v. *F.P.C.*, 365 F.2d 180 (7th Cir. 1966), *cert. denied* 385 U.S. 972 (1966); *Public Service Co. of Ind., Inc.* v. *F.P.C.*, — — F.2d —— (7th Cir. 1967); *Arkansas Power & Light Co.* v. *F.P.C.*, 368 F.2d 376 (8th Cir. 1966).

We are satisfied that the distribution facilities of CG&E were not used solely in intrastate distribution and that the exemption was not available to it with respect to its wholesale sales. *Indiana & Mich. Elec. Co.* v. *F.P.C.*, *supra; Wisconsin & Mich. Power Co.* v. *F.P.C.*, 197 F.2d 472 (7th Cir. 1952) *cert. denied* 345 U.S. 934 (1953).

In our opinion, the findings of fact of the Commission are supported by substantial evidence and are binding on us.

Affirmed.

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